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December 10, 2015

By ECF, and Chambers' Email

Hon. Stuart M. Bernstein, U.S.B.J.
United States Bankruptcy Court for the
Southern District of New York
One Bowling Green
New York, New York 10004

Re: *Securities Investor Protection Corporation v. Bernard L. Madoff*
Investment Securities LLC, Adv. No. 08-1789 (SMB) - *Picard v.*
Cohen, Adv. Pro. No. 10-04311) (SMB)

Dear Judge Bernstein:

On behalf of the proposed intervenors in the *Cohen* adversary proceeding referenced above, we write to respond to the letter submitted by the Trustee's counsel to your Honor earlier today, in which the Trustee complains about the filing of the Memorandum of Law (Provisional) of Intervenor-Customers on Value Defense Issues (Adv. ECF No. 73; Main ECF No. 12224) (the "Provisional Brief").

The proposed intervenors – all of whom are innocent customers similarly situated to Mr. Cohen (the "Customers") – filed a timely motion to intervene in this proceeding to be heard on specific legal issues that are common to most of the Trustee's avoidance actions still pending before the Court (Adv. ECF No. 61). In their reply papers (in direct response to the Trustee's stated concerns about delay), Customers committed to comply with the schedule for post-trial briefing (Adv. ECF No. 69, at 12-13). The motion to intervene remains pending before the Court.

Customer's Provisional Brief did not violate the Court's rules and was not intended in any way to disrespect the tribunal. Yesterday was the due date set by the Court for the submission of Mr. Cohen's proposed findings and conclusions on all issues in the action, including those on which Customers sought to intervene (or to be heard as *amici* in the event that the Court denies intervention). With the Court not yet having decided Customers' intervention motion, and no hearing date having been set, Customers filed their Provisional Brief. In their submission, Customers acknowledged that the Provisional Brief was subject to the Court's eventual ruling on the intervention motion. *See* Adv. ECF No. 73, at 1 n1. If Customers had delayed filing beyond that date, no doubt the Trustee would have argued that the filing was untimely and could not be considered.



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The Trustee's objections to the Provisional Brief are consistent with his strategy to seek rulings in one avoidance action that he will use to bind the defendants in others, while trying to prevent all interested parties from being heard on material issues of common importance. For that reason alone, the Court should not strike the Provisional Brief from the record.

Moreover, notwithstanding the Trustee's repeated contention that the merits addressed by the motion have been foreclosed by prior rulings, the Provisional Brief discusses the well-established authority that allows a court to revisit or even depart from prior rulings and the propriety of this Court doing so here. *See* Provisional Brief, at 7 n.10 (discussing jurisprudence applying Fed. R. Civ. P. 54 to hold that that no interim ruling is final until judgment is entered, and explaining other reasons why the law of the case doctrine does not apply here).

Customers' counsel are available to discuss these issues at the Court's convenience, telephonically or in open court, if your Honor believes that a conference is required on this matter.

Respectfully,

PRYOR CASHMAN LLP

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